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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 218

MEMPHIS NATURAL GAS COMPANY,
Petitioner,
vs.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

Excise Tax Case.

No. 219

MEMPHIS NATURAL GAS COMPANY,
Petitioner,
vs.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee,
Respondent.

Franchise Tax Case.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

Pursuant to the rules of the Supreme Court of the United States, Rule 7, Section 3, the respondent, George F. McCanless, Commissioner of Finance and Taxation of the

State of Tennessee, submits the following statement and brief in opposition to the jurisdiction of the Court to grant the writs of certiorari prayed for in this cause by the petitioner, Memphis Natural Gas Company.

I.

The Issues Raised by the Petitions Have Heretofore Been Fully Briefed and Argued Before This Court and Decided in Memphis Natural Gas Company v. Beeler, 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090.

It is the position and contention of the respondent, the State of Tennessee, that the petitions for writs of certiorari filed by the Memphis Natural Gas Company in the above entitled causes should be denied upon authority of *Memphis Natural Gas Company* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090.

In support of respondent's contention, these same litigants, namely, the Memphis Natural Gas Company and the State of Tennessee, were heretofore before this Court in *Memphis Natural Gas Company* v. *Beeler, supra.* All of the issues raised by the pending petitions for certiorari were elaborately briefed and fully argued, and on March 30, 1942, this Court decided the case adversely to the claims of the Memphis Natural Gas Company. It is insisted that these petitions for writs of certiorari are in effect nothing more or less than an effort to re-try the previous case.

It will be noted from that opinion that the Memphis Natural Gas Company was claiming immunity from taxation under the Tennessee excise tax statute (Williams Code of Tennessee, Sec. 1316) and it was insisted by the corporation that the tax was a burden upon interstate commerce.

The crux of the present litigation is the proper and correct interpretation of the opinion of this Court in *Memphis Natural Gas Company* v. *Beeler, supra.*

In that case, as in the instant case, the petitioner relied upon the commerce clause. The Supreme Court of Tennessee held (*Memphis Natural Gas Co.* v. *Pope,* 178 Tenn. 580, 161 S. W. 2d. 211) that the taxpayer was engaged in intrastate commerce by reason of a joint enterprise contract which it had with a local Tennessee corporation, under which the two corporations were engaged in the business of distributing the gas locally and divided the profits derived therefrom.

The Supreme Court of the United States affirmed the decision of the Supreme Court of Tennessee in Memphis Natural Gas Company v. Beeler *upon two grounds:* (1) Upon the ground of engaging in intrastate commerce by virtue of a joint enterprise contract to do business and share profits with a Tennessee corporation engaged in local business; (2) *upon the second ground that the Memphis Natural Gas Company maintained its commercial domicile in Tennessee and was liable for a nondiscriminatory tax upon its net income upon earnings justly attributable to Tennessee.*

The point of difference between petitioner and respondent is that petitioner asserts that the second ground upon which this Court sustained the Supreme Court of Tennessee in *Memphis Natural Gas Company* v. *Beeler, supra,* is mere dictum and is not entitled to the respect accorded judicial decision.

Counsel for the State of Tennessee respectfully insists that the second ground upon which this Court rested its decision arose in the course of the previous litigation, was elaborately briefed and fully argued before this Court, and was equally as determinative of the lawsuit as the first ground discussed in the opinion and the one upon which the Supreme Court of Tennessee primarily based its decision.

In next to the concluding paragraph of the opinion in *Memphis Natural Gas Company* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. Ed. 1090-1097, this Court decided a question of law which arose in the case which had been briefed and argued before the Court and which was determinative of the case. The respondent insists that the following language constituting the second ground of this Court's holding is determinative of the pending petitions for writs of certiorari:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. Wheeling Steel Corp. v. Fox, 298 US 193, 80 L ed 1143, 56 S Ct 773, supra, or upon net income derived from within the state, Shaffer v. Carter, 252 US 37, 57, 64 L ed 445, 458, 40 S Ct 221; Wisconsin v. Minnesota Min. & Mfg. Co. 311 US 452, 85 L ed 274, 61 S Ct 253; cf. New York ex rel. Cohn v. Graves, 300 US 308, 81 L ed 666, 57 S Ct 466, 108 ALR 721, is not prohibited by the commerce clause on which alone taxpayer relies. United States Glue Co. v. Oak Creek, 247 US 321, 62 L ed 1135, 38 S Ct 499, Ann Cas 1918E 748; Underwood Typewriter Co. v. Chamberlain, 254 US 113, 119, 120, 65 L ed 165, 168, 169, 41 S Ct 45; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 69 L ed 282, 45 S Ct 82; Western Live Stock v. Bureau of Revenue, 303 US 250, 255, 82 L ed 823, 827, 58 S Ct 546, 115 ALR 944. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. Underwood Typewriter Co. v. Chamberlain, 254 US 113, 65 L ed 165, 41 S Ct 45, supra; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 US 271, 69 L ed 282, 45 S Ct 82, supra; Butler Bros v. McColgan, 315 US 501, ante, 991, 62 S Ct. 701. It does not appear that upon any theory the tax can be deemed to infringe the commerce clause."
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> *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649-656, 62 S. Ct. 857-862, 86 L. ed. 1090-1097.

Subsequent to the decision of the Supreme Court of the United States in *Memphis Natural Gas Company* v. *Beeler, supra,* the State of Tennessee, relying upon said decision, collected certain excise and franchise taxes from the corporation after the joint enterprise contract which constituted the first ground to this Court's decision had expired. The State of Tennesse necessarily relied upon the second ground of this Court's decision as above set forth and quoted. The petitioner brought suit against the respondent to recover the taxes which had been paid under protest upon the theory that the second ground of this Court's decision was merely dictum and was not to be accorded the dignity of judicial decision.

Both the Chancery Court of Davidson County, Tennessee, and the Supreme Court of Tennessee held against the corporation in the instant case, *Memphis Natural Gas Company* v. *McCanless* (excise tax case), 180 Tenn. —, 177 S. W. 2d. 843. On page 846 of 177 S. W. 2d. the Supreme Court of Tennessee said with reference to its interpretation of the opinion of the Supreme Court of the United States in *Memphis Natural Gas Company* v. *Beeler, supra*:

> "There is still quite a controversy between the complainant and the commissioner as to whether any portion of the complainant's business in Tennessee is of a local or intrastate character. We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra. In that case, in this Court and in the Supreme Court, the argument for complainant was that no part of its business was local in character. That the relation between it and Memphis Power and Light Company was only that of seller and buyer. That there was nothing like a joint enterprise in the distribution of gas. The principal ground of the decision in this Court was that a joint enterprise in distribution did

exist. On this question the Supreme Court expressed itself thus (315 U. S. 649, 62 S. Ct. 861, 86 L. Ed. 1090): 'We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses.'

"Waiving this point, however, and passing to complainant's contention that all its business was interstate, the Supreme Court expressed itself thus: 'In any case even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. Wheeling Steel Corp. v. Fox (298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143), supra, or upon net income derived from within the state, Shaffer v. Carter, 252 U. S. 37, 57, 40 S. St. 221, 227, 64 L. Ed. 445 (458); (State of) Wisconsin v. Minnesota Min. & Mfg. Co., 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274; cf. People of State of New York ex rel. Cohn v. Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666, 108 A. L. R. 721, is not prohibited by the commerce clause on which alone taxpayer relies. United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119 (120), 41 S. Ct. 45, 65 L. Ed. 165, 168, 169; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255, 58 S. Ct. 546, 82 L. Ed. 823 (827), 115 A. L. R. 944. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. Underwood Typewriter Co. v. Chamberlain (254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165), supra; cf. Bass, Ratcliff & Gretton v. State Tax Commission (266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282), supra; Butler

Bros. v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. (991). It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.'

"From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax. In other words, treating the imposition as reaching earnings from interstate commerce, nevertheless the tax was valid.

"The complainant insists that the language of the Supreme Court last quoted was obiter dicta. To this we cannot agree. The Court refused to find that there was no substantial basis for this Court's conclusion as to the joint enterprise, and further held, disregarding joint enterprise and conceding complainant's business was all interstate, there was still liability. The concluding language of the Supreme Court was, 'It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.' "

Memphis Natural Gas Co. v. *McCanless,* 180 Tenn. —, 177 S. W. 2d. 843.

It is thus seen that the Supreme Court of Tennessee interpreted the opinion of this Court in *Memphis Natural Gas Company* v. *Beeler, supra,* as being clearly determinative of the present litigation. *The Supreme Court of Tennessee further specifically held that under the circumstances it was not necessary for them to pass upon the controversy between the parties as to whether any portion of the corporation's business in Tennessee was of a local or intrastate character.*

It was concluded that the same taxpayer was again denying his liability for the same tax which he had previously litigated unsuccessfully through the courts of Tennessee and the Supreme Court of the United States. The respondent regards petitioner's tax liability as having been plainly and unequivocally fixed by the previous decision of this Court.

II.

Stare Decisis—Obiter Dictum. A Case Is of Equal Authority Upon Each of Two Distinct and Sufficient Grounds Upon Which An Appellate Court Rests Its Affirmance of a Judgment, Although Only One of Those Grounds Was Considered in the Court Below.

In response to petitioner's contention that the second ground of this Court's decision in *Memphis Natural Gas Company* v. *Beeler, supra,* is mere dictum, we would point out the following authorities in which this Court has held precisely to the contrary—authorities in which the facts are analogous to those in the instant case. In *Union Pacific R. R. Co.* v. *Mason City & Ft. Dodge R. R. Co.,* 199 U. S. 159, 50 L. Ed. 134, this Court held:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum. Florida C. R. Co.* v. *Schutte,* 103 U. S. 118, 26 L. ed. 327, in which this court said (p. 143, L. ed. 336):
>
> " 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. *Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.*' " (Italics ours.)
>
> *Union Pacific R. R. Co.* v. *Mason City & Ft. Dodge R. R. Co.,* 199 U. S. at p. 166, 50 L. Ed. at p. 137.

In *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 72 L. Ed. 303, this Court said;

"Counsel for the petitioner here insist that this statement was not necessary to the decision because the conclusion in that case was clearly made to depend on the noninfringement of the patent and that the reference to sec 3477 could only be regarded as obiter dictum. It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than sec. 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority except by directly reversing the decision in that case on that point, which we do not wish to do."

Richmond Screw Anchor Co. v. *U. S.*, 275 U. S. at p. 340, 72 L. Ed. at p. 306.

In *United States* v. *Title Insurance & T. Co.*, 265 U. S. 472, 68 L. Ed. 1110, this Court said:

"Enough has been said to make it apparent that that case and this are so much alike that what was said and ruled in that should be equally applicable in this. But it is urged that what we have described as ruled there was obiter dictum, and should be disregarded, because the court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. *The premise of the contention is right, but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'* Union P. R. Co. v. Mason City & Ft. D. R. R. Co., 199 U. S. 160, 166, 50 L. ed. 134, 137, 26 Sup. Ct. Rep. 19; Florida C. R. Co. v. Schutte, 103 U. S. 118, 143, 26 L. Ed. 327, 336." (Italics ours.)

U. S. v. *Title Ins. & T. Co.*, 265 U. S. at pp. 485-486, 68 L. Ed. at p. 1114.

In *Florida Central R. Co.* v. *Schutte et al.,* 103 U. S. 118-145, 26 L. Ed. 327, this Court announced the rule which had been followed in its later cases, that:

> "Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no sense *dictum.* It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."
>
> *Florida Central R. Co.* v. *Schutte, et al.,* 103 U. S. 118-145, 26 L. Ed. at p. 336.

The foregoing decisions of this Court definitely and completely support respondent's contention that even though this Court based its decision in *Memphis Natural Gas Company* v. *Beeler, supra,* upon two separate grounds, both of said grounds of decision are of equal dignity and neither can be lightly brushed aside as dictum.

Petitioner's insistence upon this point is particularly weak because this Court can look to the record in *Memphis Natural Gas Company* v. *Beeler, supra,* and readily find that the same question of interstate commerce was presented in the same manner as in the instant case, and, further, the same authorities and the same arguments as are contained in the present petition for certiorari were forcefully and assiduously pressed upon this Court. The point having been raised, briefed and argued before the Court, it was made the second ground of the Court's decision and was decided in plain and unmistakable language. The Court

then painstakingly cited some ten other cases in support of the holding.

This Court had before it in *Memphis Natural Gas Company* v. *Beeler, supra,* two determinative questions. The Court fully considered those questions and carefully decided both of them, not by a casual remark, sentence or paragraph, but by a clear decision upon each of the grounds which was thoroughly supported by the citation of many authorities. The State of Tennessee could not but act in accordance with this solemn judgment of the Court.

III.

Petitioner Has At All Times Maintained Its Commercial Domicile in Tennessee and Has Been Engaged Partially in Intrastate Commerce in Tennessee.

The Supreme Court of Tennessee, in its opinion in *Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. ——, 177 S. W. 2d. at p. 846, stated as follows:

> "There is still quite a controversy between the complainant and the Commissioner as to whether any portion of complainant's business in Tennessee is of a local or intrastate character. *We do not find it necessary to pass on this controversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Company* v. *Beeler, supra.*" (Italics ours)
>
> *Memphis Natural Gas Co.* v. *McCanless,* 180 Tenn. ——, 177 S. W. 2d. at p. 846.

The respondent strongly urged upon the Supreme Court of Tennessee that a part of petitioner's business was intrastate in character, but, as above stated, the Supreme Court of Tennessee did not find it necessary to pass upon this question.

On account of the fact that petitioner is in effect attempting to re-try some of the identical issues which were before this Court in the previous litigation (*Memphis Natural Gas Company* v. *Beeler, supra*) it becomes necessary for respondent—with apologies to the Court—to re-state a very limited part of its position relative to petitioner's *intrastate* business which was relied upon before this Court in the previous litigation and which was also fully briefed and argued before the Supreme Court of Tennessee in the present litigation.

The Memphis Natural Gas Company was originally organized by some citizens of Memphis who felt it would be of advantage to the City of Memphis to buy gas in Louisiana and pipe it into Memphis, Tennessee (R. 154). During the entire time involved in this litigation the corporation has maintained its general offices in the Sterick Building at Memphis, Tennessee. All of its current banking business is done through local Memphis banks. All of its payrolls are made up in the Memphis office. All books of the Company are kept in Memphis. All directors' meetings are held at Memphis. Although it does business in Mississippi, Louisiana and Arkansas, the only operational office which is maintained is located at Memphis, Tennessee.

Although a Delaware corporation it maintains merely its corporate transfer office in that state, as required by the statutes of Delaware. The principal purpose of the organization of appellant corporation was to furnish gas to Memphis, Tennessee. All accounts payable and all operational accounts are handled in Memphis. All payments by customers are made monthly to the Memphis office. The president, vice-president, treasurer, assistant secretary-treasurer of the Company, all reside in Memphis. The active management of the business is conducted from Memphis. From 85% to 90% of petitioner's gross revenues are de-

rived from Tennessee sources and approximately 85% of its total gas is delivered to customers in Tennessee.

Rec. pp. 69, 58, 155, 156, 157, 170.

Without burdening this brief with a detailed recitation of the business activities of the petitioner in Tennessee, an examination of the record will disclose that a vast majority of all its business is conducted in Tennessee.

The basic reasoning of the respondent's position as to petitioner's commercial domicile in Tennessee has been well expressed by the Supreme Court of Minnesota (1943) in *Cargill, Inc.* v. *Spaeth, Commissioner of Taxation*, 215 Minn. 549, 10 N. W. 2d. 728, at p. 733, where that Court said:

> "Corporations are organized in some states in full recognition of the fact that they will depart therefrom to other states to establish their business homes. As a practical matter, the migration is no different from that of an individual. Legal fiction should be made to yield to reality. A corporation may make its actual, as distinguished from its technically legal, home in a state other than that of its incorporation. Where a corporation, organized under the laws of one state, transacts no business there and establishes its principal office in another, where it manages and directs its business, it acquires a commercial domicile there, in virtue of which it is subject to taxation there upon its intangibles, even though its business may extend into other states. For purposes of taxation, intangibles have a situs at the taxpayer's commercial domicile. Memphis Natural Gas Co. *v.* Beeler, 315 U. S. 649, 62 S. Ct. 857 86 L. Ed. 1090; First Bank Stock Corp. *v.* Minnesota, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061, 113 A. L. R. 228, affirming 197 Minn. 544, 267 N. W. 519, 269 N. W. 37; Wheeling Steel Corp. *v.* Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143. Because here Minnesota was the taxpayer's commercial domicile, it was taxable here upon the dividends received from its foreign subsidi-

aries, although they transacted no business here. See annotation, 102 A. L. R. 78."

Cargill, Inc. v. *Spaeth, Com'r. of Ta'n.*, 215 Minn. 549, 10 N. W. 2d. 728, at p. 733.

It is insisted by petitioner that it is only engaged in interstate transportation of gas and that any local or intrastate business which is carried on in Tennessee is carried on by the distributing companies, viz., Memphis Light, Gas & Water Division and the West Tennessee Gas Company. A close examination, however, of petitioner's activities in Tennessee shows that the corporation itself is engaged in intrastate business. It is particularly important, among other points, to note that petitioner sells gas to the Memphis Generating Company, *which is not a distributor of gas, but is on the contrary itself a consumer,* (Rec. p. 56.)

(Compare facts with *Southern Natural Gas Corporation* v. *State of Alabama,* 301 U. S. 148, 81 L. Ed. 970.)

The sale of this gas to a consumer or user—the Memphis Generating Company—is not only alleged in petitioner's original bill, but the contract between the two companies appears in the record and the transaction is freely admitted by petitioner's witnesses. Petitioner tries to distinguish its operations in Tennessee from the Southern Natural Gas Corporation case upon the legalistic and technical ground that in the Southern Natural Gas Corporation case the Court predicated tax liability upon the fact that short service lines were installed by the seller to deliver gas to the purchaser, whereas, in the instant case, it claims no such lines were installed. This Court declined to accept such a narrow view of the case, however, in *Illinois Natural Gas Company* v. *Central Illinois Public Service Commission,* 314 U. S. 498-510, 86 L. ed. 371-378, where Mr. Chief Justice Stone interprets the decision in the Natural Gas Corporation case thus:

"In Southern Natural Gas Corp. *v.* Alabama, 301 U. S. 148, 156, 157, 81 L. ed. 970, 975, 976, 57 S. Ct. 696, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

Ill. Nat. Gas Co. v. *Central Ill. Pub. Serv. Co.,* 314 U. S. 498-510, 86 L. ed. at p. 376.

The clear meaning of this interpretation is that it is the nature of the business carried on rather than any legalistic or technical detail which controls.

Respondent submits that not only is petitioner selling gas outright to a consumer in Tennessee which uses the gas for the purpose of manufacturing electricity and is thereby engaging in intrastate commerce, but a further examination of the record will reveal that petitioner has established "farm taps" in a number of instances, where gas is delivered to individual farmers (R. 53). It is true that this gas is billed and paid for in such instances through the Memphis Light, Gas & Water Division, or through the West Tennessee Gas Company, but this is obviously an effort to give such intrastate business the appearance of interstate commerce. Petitioner also delivers gas to a number of towns in Shelby County, Tennessee, outside of the City of Memphis, as well as to the municipal airport and to the Shelby County Penal Farm, which use such gas (R. 54-55).

This also is billed and paid for through the Memphis Light, Gas & Water Division, but, as in the case of the farm taps, it is apparently only an arrangement for handling in order to give an appearance of interstate commerce. Our point is that the fundamental facts show sales to consumers

and distributors alike and under decisions of this Court it is essentially an operation in intrastate commerce.

The furnishing of natural gas to consumers is intrastate commerce. The character of such business is not national, but is essentially local, and the business of a company doing such business is intrastate and is, therefore, not exempt from taxation by the State within which it is carried on. *Moore, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S., 298, 65 L. ed. 1027; also *East Ohio Gas Co.* v. *Texas Commission*, 283 U. S. 465, 75 L. ed. 1171; *Southern Natural Gas Co.* v. *Ala.*, 301 U. S. 148, 81 L. ed. 970; *Department of Public Utilities* v. *Ark.* (Law case from Supreme Court of Arkansas), 108 S. W. (2d) 586; *Interstate Natural Gas Co.* v. *Stone, Com'r.*, 103 F. (2d) 544, 307 U. S. 620, 83 L. ed. 1499. The analogy between the business of the Southern Natural Gas Company in Alabama, in its business of selling gas to consumers on demand, and that of the Memphis Natural Gas Company, in its business in Tennessee of selling gas to consumers in Tennessee on demand, is complete.

IV.

A State Is At Liberty to Levy a Nondiscriminatory Privilege Tax Upon Corporations Doing Business in a State, and There Is No Federal Requirement That a State Favor Interstate Commerce Over Intrastate Commerce.

The Tennessee excise and franchise taxes here involved accord all corporations that do business in Tennessee equal treatment and the taxes are in no sense a tax barrier. No discrimination is made in favor of intrastate commerce. The statutes tax all corporations doing business in Tennessee. The excise tax (Sec. 1316, Code of Tennessee) is measured by 3.75% of the net earnings of the corporation

for their next preceding fiscal or calendar year from business done within the State. A proper allocation formula is provided. On page 2 of the petition for certiorari in the excise tax case, the petitioner states: "We have no question about the fairness of the allocation formula used by respondent. If petitioner is liable for any excise taxes the amount assessed is equitable."

In the case of the Tennessee franchise tax, there is also an allocation formula provided, the fairness of which is not questioned, and petitioner is relying upon the same authorities to avoid both taxes. Petitioner has briefed both petitions jointly and apparently concedes that the decision of the excise tax liability controls its franchise tax liability.

We note that on page 12 of petitioner's brief the petitioner relies upon certain language of the Supreme Court of Tennessee in a companion case to the two cases here involved. *(Memphis Natural Gas Company* v. *McCanless,* 180 Tenn. —, 177 S. W. (2d) 841). That case involved the Tennessee *gross receipts tax statute and was decided against the State of Tennessee.*

The decision in the above cited gross receipts tax case by the Supreme Court of Tennessee is in effect highly inequitable, since it grants vastly preferential treatment to the petitioner as compared to domestic corporations engaged in business wholly within the State of Tennessee.

The State of Tennessee could not file a cross-petition for certiorari before this Court, for the reason that the gross receipts tax case was in reality decided upon the construction of the Tennessee statute. The Tennessee gross receipts tax statute, public Acts of Tennessee, 1937, Ch. 108, Art. 2, Sec. 2, Item G, contains highly restrictive language, which is as follows:

> "It is the intention of this item to levy a tax for the privilege of engaging in intrastate commerce *carried on*

wholly within this State and not a part of interstate commerce." (Italics ours.)

It is thus seen that by reason of the restrictive language in the State statute the practical result is that a domestic corporation engaged in the same business entirely within the State of Tennessee is required to pay approximately twice the amount of privilege taxes that have been charged against a foreign corporation engaged in both interstate and intrastate business—as in the case of the petitioner here.

This tax situation, as it now exists, penalizes the domestic corporation engaged wholly in business in Tennessee. By reason of the highly restrictive language in the Tennessee gross receipts tax statute, the Memphis Natural Gas Company has already been accorded highly preferential treatment in the matter of privilege taxes by the Supreme Court of Tennessee.

V.

Petitioner's Assignments of Error Before the Supreme Court of Tennessee Were Not Included in the Transcript Before This Court.

The rules of the Supreme Court of Tennessee (Sec. 14, 173 Tenn., pp. 873-874) require the filing of assignments of error. The petitioner did file his assignments of error before the Supreme Court of Tennessee, but obviously through oversight failed to include the same in his transcript of the record before this Court. This Court is left to some extent to surmise, from quotations of the opinion of the State Court, the Federal questions presented and the manner of their presentation. Under the decision of *Lynch* v. *New York, ex rel., Pierson,* 293 U. S. 52-55, 79

L. ed. 191, there may exist some question as to the jurisdiction of this Court upon the record in its present condition.

VI.

Conclusion.

It is inescapable that Tennessee in reality has furnished the opportunity to petitioner to have any net earnings whatever; it afforded the market; its government afforded the protection for this enterprise; the earnings came from Tennessee; the business competed with other Tennessee enterprises which paid their proportionate share of the cost of Tennessee government. To allow petitioner to avoid its just share of the tax burden would be to discriminate against other corporations doing business wholly within Tennessee. There is no obstacle to taxation of petitioner contained in the decisions of the Supreme Court of the United States construing the commerce clause.

To grant the petition for writs of certiorari would result in a gross injustice to the states in which petitioner does business. In addition to Tennessee, petitioner is also engaged in privilege tax litigation, or income tax litigation, with the states of Mississippi and Arkansas, in which it also does business (R. 214-215). If petitioner is successful in all such litigation with the states in which it does business, it is then relieved of the payment of any state privilege or income taxes *anywhere.*

The inevitable result is that other corporations engaged wholly in intrastate business bear the entire burden of these nondiscriminatory taxes. In the instant litigation the petitioner seeks to avoid this burden of state government, but readily accepts all of the benefits and protection provided

by the State of Tennessee. The petitions are without merit and should be denied.

Respectfully submitted,

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